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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 509

MORTON SOBELL, Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES
and
DIRECTOR, UNITED STATES BUREAU OF PRISONS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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and

DIRECTOR, UNITED STATES BUREAU OF PRISONS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit affirming a judgment of the United States District Court for the Middle District of Pennsylvania.

OPINIONS BELOW

The opinion of the District Court is appended hereto as Appendix A. The opinion of the Court of Appeals is appended hereto as Appendix B. Neither has been reported as yet. The judgment of the Court of Appeals is appended hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1968. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether a federal prisoner may, by a declaratory judgment or habeas corpus action, obtain judicial review of a determination by the Attorney General and the Bureau of Prisons that he should not be given credit towards service of his maximum-term sentence for a period of pre-sentence imprisonment.

2. Whether a federal prisoner sentenced to a maximum term must be given credit toward service of sentence for a period of pre-sentence imprisonment incurred by reason of his inability to make bail:

(a) Because denial of such credit violates due process and equal protection by imposing additional imprisonment because of the prisoner's financial inability to make bail; or

(b) By virtue of a proper construction of 18 U.S. Code §3568; or

(c) Because the oral sentence required that such credit be given.

3. Whether the prisoner is entitled to credit for the period of his imprisonment during the pendency of the appeal of his criminal conviction, despite the fact that he signed an election not to begin service of sentence in order to be transferred to a place of confinement where he could readily consult his attorney:

(a) Because denial of the credit violates due process and equal protection by imposing additional punishment because of the prisoner's financial inability to make bail; or

(b) Because denial of the credit imposes a penalty on the prisoner's exercise of his Sixth Amendment right to counsel; or

(c) Because denial of the credit imposes imprisonment in violation of the maximum statutory sentence and due process of law; or

(d) Because the July 1, 1966 amendment to rule 38(a)(2) of the Federal Rules of Criminal Procedure, eliminating elections not to begin service of sentence, should be applied retrospectively in the circumstances of this case; or

(e) Because the prisoner was not adequately informed of the consequences of the election.

STATUTES INVOLVED

(1) The Administrative Procedure Act, 80 Stat. 392, 5 U. S. Code § 701 ff. provides in part as follows:

Section 702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 703:

> The form of proceeding for judicial review is the special statutory proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction . . . .

Section 704:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review . . . .

Section 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency actions, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction; authority, or limitations, or short of statutory right;

* * *

(2) 18 U. S. Code § 3568 read as follows in 1950 (62 Stat. 838):

The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence.

If any such person shall be committed to jail or other place of detention to wait transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

On September 2, 1960, Congress amended the section, applicable to sentences imposed on or after October 2, 1960, to add the following proviso to the first sentence:

"Provided, That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence" (74 Stat. 738).

Subsequently, section 4 of the Bail Reform Act of 1966 amended § 3568, applicable to sentences imposed on or after September 20, 1966, so as to require the Attorney General to give a federal prisoner "credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed" 80 Stat. 217.

(3) 28 U. S. Code § 2255, 62 Stat. 967 reads in part as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released on the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

* * *

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

STATEMENT OF THE CASE

Petitioner, Morton Sobell, is a prisoner in the federal penitentiary at Lewisburg, Pennsylvania. In this litigation he advances claims that he is being imprisoned beyond the term of his sentence because the Department of Justice has refused to credit towards the service of his sentence two periods during which Sobell was confined: (a) the period from Sobell's arrest on August 18, 1950 to the sentencing on April 5, 1951, and (b) the period from July 20, 1951, when Sobell signed an election not to commence service of sentence, to February 25, 1952, when his conviction was affirmed by the Court of Appeals for the Second Circuit. It is conceded by the government that if Sobell's contentions are correct, the mandatory date for his release from imprisonment was August 2, 1968.

Facts relating to the time of confinement

On August 18, 1950, Sobell was arrested on a charge of violating the espionage act, 18 U. S. C. § 794. Bail was set at $100,000. Sobell remained in custody continuously thereafter because of his inability to make the bail.

Sobell was tried in the United States District Court for the Southern District of New York. On April 5, 1951, he was sentenced to imprisonment for thirty years, then the statutory maximum term for the offense of which he was convicted. The following colloquy took place at the time of sentencing:

> "THE COURT: . . . I, therefore, sentence you to the maximum prison term provided by statute, to wit, thirty years.
>
> While it may be gratuitous on my part, I at this point note my recommendation against parole.
>
> The Court will stand adjourned.
>
> "MR. PHILLIPS [Sobell's trial counsel]: Before the Court adjourns, are the months already served taken into consideration?

> THE COURT: No, they are not, but I will have to so sign the judgment. They have to be so considered."

The written judgment provided for imprisonment for thirty years, making no reference to the pre-sentence custody.

After sentence, Sobell was transferred to the federal penitentiary at Atlanta, Georgia. He sought to be transferred back to New York in order to confer with counsel about his appeal and to procure new counsel for the appeal. To accomplish this transfer he was required to sign a form reading as follows:

> "ELECTION NOT TO BEGIN SERVICE OF SENTENCE.
>
> Having heretofore taken an appeal from my sentence imposed on April 5, 1951, in the United States District Court for the Southern District of New York, I now elect not to commence service of the sentence."

Sobell signed this form on July 20, 1951. A few days later he was transferred to the Federal House of Detention at 427 West Street, New York City. There he was put to work in a prison job and was otherwise treated in the same manner as prisoners in that institution who were serving their sentences.

On February 25, 1952, the United States Court of Appeals for the Second Circuit affirmed Sobell's conviction. On November 19, 1952, following denial of certiorari by the Supreme Court, the mandate affirming the conviction was filed in the District Court. Sobell was then transferred to Alcatraz.

This Litigation

Before this litigation was instituted, the government, in computing Sobell's release date, did not give him credit towards sentence for (1) the custody from arrest on August 18, 1950, to sentence on April 5, 1951, and (2) the cus-

tody from his signing on July 20, 1951, of the "Election Not to Begin Service of Sentence" to the filing on November 19, 1952, of the mandate affirming his conviction.

On November 13, 1967, counsel for Sobell met with the Assistant Deputy Attorney General, who had been assigned by the Attorney General to discuss with them the proper date for the termination of Sobell's imprisonment. Counsel requested that Sobell receive credit toward his sentence for the periods of August 18, 1950 to April 5, 1951, and July 20, 1951 to November 19, 1952. The Assistant Deputy Attorney General thereafter informed them that their request was under active consideration and had been referred to the Attorney General for decision. On January 15, 1968, the Assistant Deputy Attorney General advised counsel by letter that, "After carefully reviewing the matter the Department of Justice has decided that Morton Sobell cannot be given credit administratively for the time he was in jail pending his conviction or while his case was on appeal."

On January 18, 1968, the complaint which instituted this litigation was filed in the United States District Court for the District of Columbia. The complaint sought a declaratory judgment and injunction to review the Attorney General's determinations not to credit Sobell with his confinement for the periods mentioned above.

On March 5, 1968, the Department of Justice notified Sobell's counsel that the Bureau of Prisons "has recomputed the plaintiff's time and given him credit for the period from February 25, 1952, when his conviction was affirmed by the Second Circuit Court of Appeals, to November 20, 1952, when the mandate was filed." The controversy has been reduced, therefore, to the periods of custody from August 18, 1950 to April 5, 1951, and July 20, 1951 to February 25, 1952.

Sobell moved for summary judgment, and the government moved to dismiss the complaint or, in the alternative, for summary judgment. The government also moved to transfer the action to the Southern District of New York.

Sobell opposed the transfer, arguing that the case should remain in the District of Columbia. He contended, however, that if the case were transferred, it could only be transferred to the Middle District of Pennsylvania, since under 28 U. S. C. § 1404(a), this was the only other district where the case "might have been brought."

On March 28, 1968, the District Court for the District of Columbia ordered the action transferred to the United States District Court for the Middle District of Pennsylvania. On July 1, 1968, the latter court entered an order denying Sobell's motion for summary judgment, granting on grounds of lack of jurisdiction the government's motion to dismiss that part of the action which sought credit for pre-sentence custody, and granting the government's motion for summary judgment for that part of the action which sought credit for custody between sentence and affirmance of Sobell's conviction.

On August 16, 1968, the Court of Appeals for the Third Circuit affirmed the judgment of the District Court. It expressly noted that its judgment was "without prejudice to the merits" on the issue of pre-sentence custody, but affirmed on the merits on the claim for post-sentence credit. The majority held that jurisdiction over the post-sentence custody period rested on habeas corpus principles. Judge Freedman dissented in part because in his view the District Court did not have jurisdiction on either claim. He added that both claims raised "serious questions on the merits."

REASONS FOR GRANTING THE WRIT

1. By August 2, 1968, petitioner had been imprisoned for the full period of time required to satisfy his 30-year maximum term sentence. Yet the Department of Justice is incarcerating him for an additional 15 months because it refuses to credit him with his confinement from arrest to sentence and from the date he signed the election form to the affirmance of his conviction. Petitioner would not have suffered this imprisonment in excess of the maximum statu-

tory term had he been financially able to make bail pending trial and appeal. Accordingly, this additional penalty offends the principle that in the administration of criminal justice it is constitutionally impermissible to discriminate between prisoners or defendants on the basis of their financial circumstances. *Griffin* v. *Illinois*, 351 U.S. 12; *Eskridge* v. *Washington State Board*, 357 U.S. 214; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, 365 U.S. 708; *Lane* v. *Brown*, 372 U.S. 477; *Douglas* v. *California*, 372 U.S. 533; *Roberts* v. *LaVallee*, 389 U.S. 40.

Application of the rule of equal protection in this case would not open the door to claims for the elimination of every inequality attributable to poverty in the administration of the criminal law. This is not simply a situation where the government extended a privilege to all but only the wealthy could take advantage of it. Here the government affirmatively and gratuitously aggravated the disadvantage stemming from the lack of financial resources. It is the government's refusal to allow credit for time spent in jail, not the mere inability to take advantage of the bail system, which is now producing the unequal treatment. The government's action is equivalent to inflicting a heavier sentence, an added punishment, on those who cannot afford bail.

The Bail Reform Act of 1966, 80 Stat. 267, 18 U.S.C. §3568, provides that persons sentenced after September 20, 1966, must be granted credit for periods spent in jail as a result of an inability to post bail. A number of circuits have held that the principle of the Bail Reform Act must be applied to prisoners who, like the petitioner here, were sentenced to maximum sentences prior to that date. *Stapf* v. *United States*, 376 F. 2d 326 (D.C. Cir.); *Dunn* v. *United States*, 376 F. 2d 191 (4th Cir.); *United States* v. *Smith*, 379 F. 2d 628 (7th Cir.); *Bryans* v. *Blackwell*, 387 F. 2d 764 (5th Cir.). As a result of these decisions, the Bureau of Prisons has ruled that persons sentenced to maximum terms between October 2, 1960 and September 20, 1966 must be

given credit for pre-sentence custody. Bureau of Prisons Policy Statement 7600.49A issued February 9, 1968. The October 2, 1960 cut-off date, which bars application of the policy to Sobell, was the effective date of a September 2, 1960 amendment to 18 U.S.C. § 3568, dealing with mandatory minimum sentences, supra p. 5. The rationale for the cut-off date escapes us. Between October 27, 1967 and February 9, 1968 the Bureau of Prisons gave administrative credit for pre-sentence custody confinement of maximum term prisoners convicted in the 4th, 7th or District of Columbia circuits, without regard to the date of sentence. Bureau of Prisons Policy Statement 7600.49 issued October 27, 1967. This policy statement was in effect at the time petitioner's counsel applied to the Attorney General for relief. The amended policy statement carrying the October 2, 1960 cut-off date was issued only after petitioner filed his complaint in the District Court for the District of Columbia.[1a]

The court below refused to consider the merits of the claim so far as pre-sentence custody was concerned,[1] thus leaving petitioner without any effective relief even though his mandatory release date has passed. So far as post-sentence custody was concerned, the majority below stated only: "While the result [i.e. the discrimination against petitioner for inability to make bail] may be unfair it is not sufficiently invidious to reach constitutional proportions." This view cannot be squared with the decisions of this Court or with ordinary concepts of "invidious" consequences.

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[1] The majority found an absence of jurisdiction in the fact that the applicable statute, 18 U.S.C. § 3568, "was by no means decisive of the present issue" and there was no controlling opinion by this Court. The inference to be drawn is that if the legal issues were clear on the merits the court would have jurisdiction. We fail to follow this concept of jurisdiction that disappears when the court is called upon to resolve a difficult or novel legal question.

[1a] Policy Statements 7600.49 and 7600.49A are attached hereto as Appendices D and E respectively.

2. The decision below sanctions a procedure whereby the government exacts a price, namely, additional time in jail, as a condition to granting the right to effective counsel on appeal. The court below held that this procedure, though it "left much to be desired," did not violate the Sixth Amendment. The ruling is inconsistent with the holdings of this Court that the government may not in any way encumber the right to counsel. *Chandler v. Fretag*, 348 U.S. 3; *Glasser v. United States*, 315 U.S. 60, 70; *Commissioner v. Tellier*, 383 U.S. 687; *Bitter v. United States*, 389 U.S. 15. The ruling also collides with the general principle that the government cannot exact a price for the exercise of a constitutional right. See, e.g., *Sherbert v. Verner*, 374 U.S. 398; *United States v. Jackson*, 390 U.S. 570; *Simmons v. United States*, 390 U.S. 377.

The majority below held that petitioner was not denied any Sixth Amendment right because petitioner's "choice was between immediate proximity to counsel and credit on his sentence" and this was not "an impermissible burden." This ignores the realities that petitioner believed it necessary to be transferred to New York to consult counsel and the government agreed. It is too late to argue now that the government need not have transferred him and could have kept him in Atlanta. Even if petitioner had only a privilege and not a constitutional right to be transferred to New York in order to be near counsel, the government still cannot attach an unconstitutional condition (service of additional time), upon the exercise of the privilege. See, e.g. *Sherbert v. Verner, supra; Keyishian v. New York Board of Regents*, 385 U.S. 589.

Nor can the decision below be squared with the Fifth Amendment. The court held that the government may impose imprisonment on petitioner over and above the maximum sentence, for no better reason than that he asked and was permitted to be confined near his counsel. Imprisonment for such a reason is arbitrary, serves no legitimate governmental purpose, and hence violates due process.

3. The case also raises the important question as to whether a federal prisoner may employ the remedies of habeas corpus or declaratory judgment to challenge his being held in confinement after service of the sentence imposed upon him. The petitioner here was denied consideration of his claim for pre-sentence custody on the ground that he should have pursued his remedy in the sentencing court under 28 U.S. Code § 2255. Other prisoners who have presented to the sentencing courts claims under § 2255 that they have completed service of their sentences have been told that their proper remedy is habeas corpus in the jurisdiction of confinement. *Stinson v. United States,* 342 F.2d 507 (8th Cir.); *Allen v. United States,* 327 F.2d 58 (5th Cir.); *Freeman v. United States,* 254 F.2d 352 (D.C. Cir.); *Costner v. United States,* 180 F.2d 892 (4th Cir.).

The rule in most circuits appears to be that habeas corpus and not § 2255 is the appropriate remedy for a prisoner in a federal penitentiary who argues that he has fully served the sentence or sentences imposed upon him and therefore should be discharged from further confinement. *Darnell v. Looney,* 239 F.2d 174 (10th Cir.); *Mills v. Hunter,* 204 F.2d 648 (10th Cir.); *Paccione v. Heritage,* 323 F.2d 378 (5th Cir.); *Halprin v. United States,* 295 F.2d 458 (9th Cir.), and cases cited *supra.* This rule also conforms to the natural reading of § 2255, since a challenge to failure to credit periods of confinement is not an attack on the validity of the sentence.

Both branches of petitioner's complaint were based on the claim that he had, by August 2, 1968, fully served the sentence imposed upon him. Petitioner did not on either branch challenge the validity of the sentence. The majority below held that habeas corpus jurisdiction existed on the claim relating to the post-sentence period, but that the claim relating to pre-sentence custody could be entertained only in a § 2255 proceeding in the sentencing court. Judge Freedman, dissenting, believed that both aspects of peti-

tioner's case could be considered only in a § 2255 proceeding. Under the dissenting opinion, petitioner should have brought his entire case in New York; under the majority view, petitioner is required to bring half his case in New York, and half in Pennsylvania. Yet, if the government had not succeeded in maneuvering a transfer of the case from the District of Columbia[2] that court could have reached the merits on both aspects of petitioner's case, *Hurley v. Reed*, 288 F.2d 844 (D.C. Cir.); *Freeman v. United States, supra*.

Federal prisoners seeking release on the grounds that they have served their sentences and the government has erroneously computed the time served ought not to be shunted from court to court in order to get an adjudication on their claims, meantime remaining in confinement. The end result of such a process is that a prisoner may find that he was entitled to relief too late for the decision to be of any value to him.[3]

It is conceded that if petitioner is correct on the merits on both aspects of his claim he was entitled to a mandatory release on August 2, 1968. Petitioner timely sought relief by having his counsel seek an administrative determination from the Attorney General on October 31, 1967, and thereafter suing on January 18, 1968 to review the adverse decision of the Attorney General. Both the majority and the dissent below recognized that petitioner's claim to obtain credit for pre-sentence custody presented a seri-

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[2]The transfer was sought and obtained not on any jurisdictional ground but solely on the contention that the courts in the District of Columbia were too busy to entertain cases where prisoners were confined elsewhere. See *Young v. Director, U.S. Bureau of Prisons*, 367 F.2d 331.

[3]Prior to the mandatory release date, we see no reason why the courts do not have jurisdiction under the Administrative Procedure Act (5 U.S.C. §§ 702-706), the declaratory judgment act (28 U.S.C. § 2201, and under 28 U.S.C. § 1331, to review administrative determinations denying credit for periods of confinement.

ous question on the merits. Yet petitioner, having been shifted from the District of Columbia to Pennsylvania, is now told he must go to New York, with no court as yet willing to consider the merits of this aspect of his complaint.

In the interests of the efficient and seemly administration of justice, the Court should take this opportunity to settle the appropriate procedure for prisoners to obtain judicial determinations of their claims that they are being imprisoned beyond the terms of their sentences.

CONCLUSION

Certiorari should be granted, the judgment below should be reversed, and the petitioner should be ordered discharged from custody.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MORTON SOBELL,
Plaintiff

v.

ATTORNEY GENERAL OF THE UNITED STATES and DIRECTOR, UNITED STATES BUREAU OF PRISONS,
Defendants

NO. CIV-68-144

OPINION

This matter is before the court on plaintiff's motion for summary judgment, and defendants' motion to dismiss or in the alternative for summary judgment.

Plaintiff originally filed a complaint in the United States District Court for the District of Columbia seeking a declaratory judgment and injunctive relief. The defendants filed a motion to change venue, requesting that the court transfer the case to the United States District Court for the Southern District of New York. Plaintiff then filed a motion for summary judgment, and by Order dated February 27, 1968, the defendants were permitted to postpone answering that motion until the motion for a change of venue was decided.

Defendants' motion for a change of venue was denied on March 6, 1968, and the government immediately filed a motion for reconsideration. Oral argument was heard on the motion and on March 28, 1968, the case was ordered transferred to this district. On March 26, 1968, the government moved to have the action dismissed, or in the alternative for summary judgment.

A hearing was held before this court on April 28, 1968, and extensive oral argument heard. In addition, both sides have filed supplemental briefs.

Plaintiff is presently incarcerated in the United States Penitentiary at Lewisburg, Pennsylvania, serving a sentence of thirty years, the maximum penalty for the offense of which he was convicted. He was arrested on August 18, 1950, and remained in custody from that date because of his inability to meet his bond, which was set at $100,000.00. He was sentenced on April 5, 1951, at which time he was transferred to the Federal Penitentiary at Atlanta, Georgia. On July 20, 1951, he was transferred back to New York City to enable him to consult with his attorney concerning his pending appeal. He remained there until November 19, 1952, two days after the Supreme Court denied a petition for rehearing in his case.

The issues in this case are whether the plaintiff is entitled to credit for (1) the period from August 18, 1950, the date of his arrest, to April 5, 1951, the date of his sentencing, and for (2) the period from July 20, 1951 to February 25, 1952, during which time his appeal was pending before the Court of Appeals. (After plaintiff instituted this action, the Bureau of Prisons, in accordance with its pre-existing policy, corrected plaintiff's sentence so as to give him credit for the time served between the affirmance by the Court of Appeals and the mandate of the Supreme Court).

If plaintiff is given credit for these two periods his mandatory release date will occur on or about July 28, 1968, if not, the date will occur on or about April 3, 1970. Accordingly, plaintiff's counsel requested from the defendant Attorney General a formal ruling that credit for these disputed periods be accorded to plaintiff. After full consideration, the Attorney General issued a ruling that the plaintiff would not be granted the requested credit. This suit was then instituted.

I

TIME SPENT IN CUSTODY BETWEEN ARREST AND SENTENCE

Plaintiff contends that he is entitled to credit for the time he spent in custody between his arrest and the date of imposition of sentence for several reasons. He argues that since he was given the maximum sentence allowable for his offense, failure to give him credit for the time spent in presentence custody would result in his serving more than the maximum sentence imposed, in violation of 18 U.S.C. § 3568. He also asserts that the sentencing judge intended that such credit be given. Finally, plaintiff contends that this additional penalty has been imposed upon him solely because of his financial inability to meet the bond set for his release, in contravention of the constitutional principles of equal protection.

The first question that must be answered is whether this is the proper court to decide the issue. The defendants have from the very outset of this case taken the position that the question of presentence credit properly should have been presented to the sentencing court of the Southern District of New York, since it is, in essence, an attack on the legality of plaintiff's sentence. Plaintiff, however, contends that he is not seeking to correct the sentence, but to obtain judicial review of an administrative decision of the Attorney General as to how the sentence should be calculated.

Plaintiff asserts that the District Court for the District of Columbia has ruled that this proceeding is rightly brought under the Administrative Procedure Act and the declaratory judgment provision, and that it is not a proceeding which could only be brought under 28 U.S.C. § 2255. To support this contention plaintiff points out that by transferring the case to this district, the judge necessarily ruled that it was not a 2255 proceeding, since this court would not have jurisdiction over such an action. Also, plaintiff states that if the District of Columbia Court had conceived that plaintiff's only remedy was under § 2255, so that it therefore did not

have jurisdiction, it could not have transferred the case under 28 U.S.C. § 1404 (a) at all; it would have been compelled to dismiss it.

Plaintiff's argument is not convincing. The record of this case clearly reveals that the court in the District of Columbia did not at any time consider the merits of this action, but merely ruled on the government's motion for change of venue. Further, the transcript of the argument on the goverment's motion for reconsideration clearly shows that the judge thought that the Southern District of New York was the proper forum (T. p. 8, 14), and only transferred the case to this district because plaintiff preferred this district to the Southern District of New York. (T. p. 16).

Plaintiff also argues that the Attorney General has acquiesced in the transfer of the case to this district. Plaintiff points out that, in his reply to plaintiff's memorandum in opposition to a change in venue, the Attorney General stated that, while he adhered to his position that the case should be transferred to New York, "[W]e have no objection to the transfer of this case to Lewisburg, if the plaintiff prefers Lewisburg." However, plaintiff neglects to mention that the Attorney General footnoted that particular sentence with the following statement:

> Since Stapf held that the sentencing court is the appropriate body to grant credit for pre-sentence custody, if any is available, we do caution that the United States District Court at Lewisburg may not believe itself appropriate for disposition of the issue of pre-sentence custody. P.1, n.1.

Plaintiff complains that in the defendants' motion to dismiss the Attorney General rested only "on the ground that the complaint fails to state a claim upon which relief can be granted," and that nowhere in his memorandum in support of this motion did he suggest that this court does not have jurisdiction or that the case should be transferred a second time. Plaintiff feels that under these circumstances

the Attorney General is precluded from urging this court to retransfer the case to New York.

This argument is easily answered. Rule 12(h) (3) of the Federal Rules of Civil Procedure states:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

It has been held that the question of jurisdiction over the subject matter is not waived if not raised in the defendants' answer and may be raised at any time. Xaphes v. Mossey, 224 F. Supp. 578 (D.C.Vt. 1963). The court in Mertens v. Flying Tiger Line, Inc., 341 F. 2d 851, 856 (2d Cir. 1965), states that any party at any state of the proceedings would be entitled to a dismissal for lack of subject matter jurisdiction under Rule 12(h), F.R.C.P.

Plaintiff further asserts that even if this question could be brought under Section 2255, he is nevertheless entitled to bring this proceeding under the Administrative Procedure Act and the Declaratory Judgment Act. In his memorandum on jurisdiction he states that both this circuit and the District of Columbia circuit have held that this procedure is available to test the question whether a federal prisoner has been denied the right of counsel at a parole board revocation hearing, even though he might also have proceeded by habeas corpus in the district of his confinement. (p. 4). While the cases cited by plaintiff for this proposition do so hold, this court is of the opinion that those cases do not support the plaintiff's position in this case because the subject matter involved is substantially different.

Plaintiff contends that the sentencing judge intended that he be given credit for the time spent in presentence custody, and so stated when pronouncing sentence. Both 28 U.S.C. § 2255 and Rule 35 of the Federal Rules of Criminal Procedure state that the sentencing court is the proper forum to decide issues of this type. It is difficult to understand how this issue can be considered as anything but a proceeding under one of these provisions, and plaintiff cannot

change the nature of his action merely by placing an improper label on it.

Plaintiff states that it is the duty of the Attorney General to make the corrections he seeks. However, in Stapf v. United States, 367 F. 2d 326, 330 (D.C. Cir. 1966), the court stated:

> The foregoing statutory and constitutional considerations compel us to hold that it was and *is the duty of the sentencing court* to provide credit for presentence custody for want of bail to all defendants not granted credit administratively by virtue of the provisions of § 3568. (Emphasis supplied).

In United States v. Pratt, 276 F. Supp. 80 (D.C.N.J. 1967), petitioner sought credit for the time spent in custody prior to the imposition of the maximum sentence. The court treated the application as one made pursuant to Section 2255, and stated that the facts rendered the judgment vulnerable to collateral attack and subject to correction under that section. Since both Stapf and Pratt are relied on by plaintiff, it is difficult to see how he arrives at the conclusion that the Attorney General is the proper party from whom to seek relief. It is possible that the fact that plaintiff has previously brought seven unsuccessful 2255 actions on different issues in the Southern District of New York has made him reluctant to return there again, but this does not alter the fact that New York is the proper forum to resolve this issue.

Finally, plaintiff argues that it would be unfair to transfer this case a second time because unless this litigation is resolved in the near future he will suffer merely by reason of the delay in the courts. While this court is sensitive to plaintiff's problem, and is reluctant to do anything to delay a prompt adjudication of the matter, it simply does not have jurisdiction over this issue. However, any delay is due to the fact that plaintiff has ignored the proper forum. It should also be noted that the plaintiff was sentenced in April, 1951, and his conviction was affirmed in February,

1952. He has had ample opportunity to make proper application for relief.

Because this court is without jurisdiction plaintiff's claim for credit for the time spent in presentence custody must be dismissed.

II

TIME SPENT IN CUSTODY AFTER SENTENCING AND PENDING APPEAL

Plaintiff contends that the denial of credit for the time he spent in custody after sentence and pending appeal is unlawful and unconstitutional in that it is not justified by Rule 38(a) (2) of the Federal Rules of Criminal Procedure, and it violates his right to counsel under the Sixth Amendment and his right to equal protection of the laws under the Fifth Amendment. Plaintiff's contentions will be considered seriatim.

A. IS THE DENIAL OF CREDIT FOR THIS PERIOD JUSTIFIED UNDER RULE 38(a) (2) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE?

After plaintiff's conviction he was transferred from the Tombs, where he had remained during trial, to the federal penitentiary in Atlanta, Georgia. In order to return to New York to consult with his counsel concerning his pending appeal, plaintiff signed the following form:

> ELECTION NOT TO BEGIN SERVICE OF SENTENCE
>
> Having heretofore taken an appeal from my sentence imposed on April 5, 1951, in the United States District Court for the Southern District of New York, I now elect not to commence service of the sentence.
>
> Signed this 20 day of July, 1951
>
> (Exhibit A of plaintiff's complaint).

The signing of this form was a prerequisite to plaintiff's return to New York because in July, 1951, Rule 38(a) (2) of the Federal Rules of Criminal Procedure read as follows:

> A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

Thus, in order for plaintiff to be returned to New York and consult with his counsel, he had to agree to delay beginning service of his sentence. Plaintiff contends that this waiver was not made with knowledge of its consequences and is therefore ineffective.

Plaintiff states that at the time of signing the form he was not notified by any prison official or anyone else that the consequence of signing this form would be a denial of credit for the time spent in custody while in New York. He claims that he wrote to his trial attorney asking him to take steps to have him transferred back to New York, but that he did not receive a direct reply from his counsel. However, prison officials informed him of the requisite procedure and supplied him with the form. (Affidavit of Morton Sobell in support of motion for summary judgment, paragraph 11).

The government, however, contends that plaintiff had ample opportunity to have the advice of his counsel before he signed his "Election." Exhibit B of the government (Attached to the government's brief in support of its motion) is a telegram dated July 2, 1951, from Sobell to his attorney, which read as follows: "Start election proceedings immediately. Letter follows." This message implies that plaintiff and his attorney had discussed this matter at some prior time. On July 5, 1951, plaintiff's attorney sent telegrams to both plaintiff and the warden of the Atlanta penitentiary. (Government Exhibits A and C).

The telegram to Sobell read as follows:

> RECEIVED YOUR LETTER OF JUNE 29 THE WARDEN HAS NECESSARY BLANKS TO BE EXECUTED BY YOU FOR ELECTION I HAVE TELEGRAPHED THE WARDEN ASKING HIS COOPERATION FOR THAT PURPOSE YOU MIGHT ASK FOR OPPORTUNITY TO EXECUTE THE BLANKS DO NOT WORRY ABOUT TIME LIMIT ON APPEAL-EDWARD KUNTZ-.

This message refutes plaintiff's contention that he never heard from his attorney directly.

The telegram from plaintiff's attorney to the warden stated:

> MY CLIENT MORTON SOBELL 71342-A WISHES TO ELECT NOT TO SERVE PENDING HIS APPEAL AND DESIRES TO BE RETURNED SOUTHERN DISTRICT NEW YORK FOR PURPOSE OF CONSULTATIONS ON APPEAL WOULD YOU KINDLY HAVE HIM EXECUTE THE NECESSARY FORMS FOR THAT PURPOSE VERY GRATEFUL FOR YOUR COOPERATION.

This message could reasonably lead the warden to believe that Sobell had consulted with his attorney concerning this matter, and was fully aware of the consequences.

In support of his contention that his election not to serve was not made intelligently, plaintiff cites the case of Bolden v. Clemmer, 235 F. Supp. 832 (E.D.Va. 1964), where it was held that an indigent inmate who had, without advice of counsel, signed a form similar to the one signed by plaintiff had not made a voluntary election. However, in the instant case plaintiff was given ample opportunity to consult with his counsel, as the telegrams mentioned previously show.[1]

It is the opinion of this court that plaintiff's election was intelligently made with a full knowledge of the consequences and with advice of counsel.

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[1] It should also be noted that Sobell holds a master's degree in electrical engineering and possesses an extremely high I.Q.

B. DOES THE DENIAL OF CREDIT FOR THIS PERIOD CONSTITUTE A VIOLATION OF PLAINTIFF'S RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AMENDMENT?

Plaintiff's transfer from Atlanta to New York was for the purpose of consulting with counsel in connection with his appeal. There is no contention that after his arrival in New York his access to his counsel was in any way hampered. However, plaintiff contends that in order for him to return to New York to exercise his constitutional right, the government exacted an unconstitutional price, namely, that he had to serve an additional time in prison.

In support of this contention plaintiff relies primarily on Sherbert v. Verner, 374 U.S. 398 (1963). In that case a person who celebrated the Sabbath on Saturday was denied unemployment compensation because she would not take a job which required that she work on the day of her Sabbath. The Supreme Court stated:

> . . . The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. Id. at p. 404.

Similarly, plaintiff contends that he is being imprisoned for additional months because he exercised his constitutional right to counsel.

Prior to its recent amendment, Rule 38(a) (2) of the Federal Rules of Criminal Procedure provided that if a defendant elected not to commence service of his sentence the sentence was stayed. Under this rule, it was uniformly held that a prisoner was not entitled to credit for the time he served under his "election." Comulada v. Willingham, 351 F. 2d 936 (10th Cir. 1965), cert. denied, 384 U.S. 973

(1966); Allocco v. Heritage, 310 F. 2d 719 (5th Cir. 1962); Shelton v. United States, 234 F. 2d 132 (5th Cir. 1956).

Rule 38 was promulgated by the Supreme Court and the constitutionality of this rule was upheld in Baker v. United States, 139 F. 2d 721 (8th Cir. 1944), rehearing denied, 325 U.S. 894 (1945). Plaintiff requests this court to hold that this rule was unconstitutional as applied to him because his choice was not a completely free one.

It is obvious that in order to consult with his counsel, plaintiff was required to give something up. It is also obvious that the same is true of all choices, and that in electing to pursue one course of action, another must be surrendered. This court is unwilling to hold that the choice required of plaintiff placed an unconstitutional burden on him.

C. WOULD A REFUSAL TO GIVE CREDIT FOR THIS PERIOD BE A DENIAL OF DUE PROCESS OF LAW AND A VIOLATION OF THE CONSTITUTION'S SEPARATION OF POWERS?

Plaintiff states that had he been free on bail pending appeal he could have engaged and consulted counsel free of hindrance by the government, but that this was not possible because he was financially unable to post bond. He argues that to hold that he is not entitled to credit for time spent in custody pending appeal, whereas a defendant financially able to post bond would have been able to consult counsel without incurring any penalty, denies plaintiff equal protection of the laws.[2]

Plaintiff states that a classification which establishes a differentiation between persons, in order to be valid, must bear a reasonable relationship to a legitimate government pur-

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[2]Plaintiff admits that the Fifth Amendment does not contain any equal protection clause, but argues that the due process of law guaranteed in the Fifth Amendment embodies the same concept of equal protection as is explicitly set forth in the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

pose, and that differentiation becomes an invidious discrimination under equal protection unless it bears a reasonable relationship to a legitimate government purpose. He argues that here the purpose was not to make certain that he would be available for trial, because he was given the opportunity to have bail but could not afford it. Therefore, the only purpose it served was to give him a longer sentence.

Plaintiff concedes that the equal protection clause cannot be pushed to the point where every inequality in the administration of criminal justice attributable to wealth (or the lack of it) must be equalized by the government. This court agrees and declines to hold that plaintiff has suffered a deprivation of a constitutional right because of his inability to afford bail.

At plaintiff's trial the government produced evidence tending to show that plaintiff had fled to Mexico to escape prosecution, and that he had been deported from that country. United States v. Rosenberg, 195 F. 2d 583, 602 (1952). Under these circumstances plaintiff's inability to obtain bail could have been caused by considerations other than financial. It should also be noted that plaintfiff apparently never appealed from the amount set for bail. It therefore cannot be said that the fact that plaintiff is serving a longer sentence than he would have if he had obtained bail is the result of arbitrary or capricious action on the part of the government, which bore no relation to a legitimate government interest.

Finally, it should be noted that in computing plaintiff's sentence, the Bureau of Prisons was merely following the law as prescribed in 18 U.S.C. § 3568 and Rule 38 (a) (2) of the Federal Rules of Criminal Procedure. No other choice was open to the Bureau, and therefore there was no substitution of an administrative decision for the legislative determination of the maximum penalty.

Accordingly, the motion of plaintiff for summary judgment will be denied; the motion of the defendants to dismiss will be granted as to the issue of presentence custody,

and denied as to the issue of custody pending appeal; and the motion of the defendants for summary judgment as to the issue of custody pending appeal will be granted.

July 1, 1968.

Frederick V. Follmer
United States District Judge

ORDER

NOW, July 1, 1968, in accordance with Opinion filed this day, It is Ordered that:

The motion of plaintiff for summary judgment is denied;

The motion of defendants to dismiss is granted as to the issue of presentence custody, and denied as to the issue of custody pending appeal; and

The motion of defendants for summary judgment as to the issue of custody pending appeal is granted.

Frederick V. Follmer
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17349

MORTON SOBELL,

Appellant,

v.

ATTORNEY GENERAL OF THE UNITED STATES,
DEPARTMENT OF JUSTICE, WASHINGTON, D. C., AND
DIRECTOR, UNITED STATES BUREAU OF PRISONS,
DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued July 30, 1968

Before FREEDMAN and SEITZ, *Circuit Judges,* and LAYTON, *District Judge.*

OPINION OF THE COURT

(Filed August 16, 1968)

SEITZ, *Circuit Judge.*

On April 5, 1951, the plaintiff, appellant here, was sentenced in the United States District Court for the Southern District of New York to serve a thirty year sentence for conspiracy to violate the espionage statute (50 U. S. C. § 32(a) (1946 ed.)). He is now a prisoner in the federal penitentiary at Lewisburg, Pennsylvania. On January 18,

1968, after unsuccessfully seeking relief from the Attorney General, he brought the present action in the district court [1] under the Administrative Procedure Act (5 U. S. C. A. §§ 702, 703, 704 and 706) and the Declaratory Judgment Act (28 U. S. C. A. § 2201) seeking a determination as to whether he was entitled to credit on his prison sentence for the periods:

1. from August 18, 1950, the date of arrest, to April 5, 1951, the date of his sentencing, and

2. from July 20, 1951, to February 25, 1952, the period during which his appeal was pending.

The district court denied plaintiff's claim for the period of pre-sentence imprisonment on the ground of lack of jurisdiction. It denied on the merits the request for appeal time credit. Plaintiff appeals both determinations. We are acting promptly because plaintiff is entitled to be released if there is merit to both of his claims.

We first consider the claim for pre-sentence credit. The district court held that although the plaintiff was incarcerated within its district, neither the Administrative Procedure Act nor the Declaratory Judgment Act gave that court jurisdiction. Rather, it held that under both 28 U. S. C. A. § 2255 and Rule 35 of the Federal Rules of Criminal Procedure the sentencing court (Southern District of New York) was the proper forum to decide this type of issue.

This action was brought against the Attorney General of the United States and the Director of the United States Bureau of Prisons. We need not decide whether the question is one going to the district court's jurisdiction because we are satisfied, in any event, that the claim for pre-sentence credit is within the ambit of 28 U. S. C. A. § 2255, and there-

1 The action was instituted in the United States District Court for the District of Columbia but was transferred by that Court to the court below rather than to the sentencing court. We express no opinion as to the propriety of the transfer except to say that we do not consider that it constituted an adjudication of the issues here raised.

fore a matter for the sentencing court. Plaintiff's term of imprisonment is considered by defendants to have commenced on the date of sentencing. Plaintiff claims that 18 U. S. C. A. § 3568, as then in effect, required that his sentence commence on the date of his arrest. He also contends that the sentencing court intended to employ the earlier commencement date. Thus, plaintiff is asking this court, in substance, to make a determination regarding the commencement date of the sentence intended or required to be set by the sentencing court. The relief granted, if any, would come within that provision of § 2255 which permits the sentencing court to "correct the sentence." So viewed, plaintiff is attacking the correctness of the sentence as imposed. Under these circumstances, we conclude, as did the district court, that relief, if any, with respect to this claim is a matter for the sentencing court. Moreover, the Attorney General was not confronted with a situation where the governing law was clear. The statute applicable at the time of sentencing was by no means decisive of the present issue and no controlling opinion of the United States Supreme Court or of the Second Circuit was before the Attorney General.

Plaintiff says that the Attorney General exercised an administrative power when he issued a "Policy Statement" on February 9, 1968, in which he said that implementation was to be given to court decisions regarding jailtime credit on sentences imposed between October 2, 1960, and September 19, 1966. It is true that the Attorney General declared such a policy but, neither the policy by its terms nor its underlying authority would apply to plaintiff's sentence which, of course, was imposed before October 2, 1960. This is not to say that some of the reasoning of the policy statement might not be applicable to plaintiff's sentence. However, since we find that the authority to grant the relief requested was in the sentencing court, our decision is not affected by his policy statement. Other reasons advanced by plaintiff are equally without merit and indeed, in some

instances, point to the practical desirability of a determination of the present issue by the sentencing court. The district court's dismissal of this claim will be affirmed without prejudice to the merits thereof.

We next consider plaintiff's claim to credit for the period spent in custody while his appeal to the Second Circuit Court of Appeals was pending.

Plaintiff was sentenced on April 5, 1951. He was transferred to the federal penitentiary at Atlanta, Georgia. After transfer, he sought to be transferred back to New York in order to consult and assist his counsel concerning the appeal. To that end, and on the basis of his counsel's advice, he signed the following form:

"*Election Not To Begin Service of Sentence*

"Having heretofore taken an appeal from my sentence imposed on April 5, 1951, in the United States District Court for the Southern District of New York, I now elect not to commence service of the sentence.

"Signed this 20 day of July, 1951."

Rule 38(a)(2) of the Federal Rules of Criminal Procedure, as then in effect, reads:

"A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail."

Thereafter plaintiff was transferred to New York and remained there while his appeal was processed.

We first note that the district court decided this issue on the merits. The defendants did not raise in the district court and do not here attack that court's jurisdiction to decide this issue. The jurisdictional issue was, however, raised by the court at oral argument. The majority of the court believes that the district court had jurisdiction to declare plaintiff's rights here. The Attorney General administered the election procedure provided by F. R. Cr. P. 38(a)(2), and plaintiff was subject to his custody at the time he invoked this Rule. Plaintiff's attack on the conse-

quences of his election was, of course, based on events occurring after his sentence was imposed. We believe that these factors authorized an action for declaratory judgment which was jurisdictionally justified by the federal habeas corpus statute[2] without prior resort to the sentencing court under 28 U. S. C. A. § 2253.[3] See Stinson v. U. S., 342 F.2d 507 (8th Cir. 1965), Allen v. U. S., 327 F.2d 58 (5th Cir. 1964), Halprin v. U. S., 295 F.2d 458 (9th Cir. 1961), Freeman v. U. S., 254 F.2d 352 (D. C. Cir. 1958), Barrett v. Hunter, 180 F.2d 510, 514 (10th Cir.), cert. denied 340 U. S. 897 (1950), and Costner v. U. S., 180 F.2d 892 (4th Cir. 1950). In view of our decision on this issue we need not consider whether the Administrative Procedure Act would also supply jurisdiction in this case.

As to the merits, plaintiff first contends that the waiver or "election" was not made with knowledge of its consequences and was therefore ineffective. He argues that he was not aware that by signing the election he would not be given credit for the time served while the appeal was pending. It is undisputed that prior to his signing the election form his counsel wrote him about the matter and he explicitly authorized his attorney to "start election proceedings immediately." It is further undisputed that, at counsel's request, the prison officials made the election document available for plaintiff's signature. Considering the language of the form and the undisputed facts surrounding its signing we can find nothing in this record which would relieve him from the consequence of his affirmative, attorney counselled, action in signing the election.

Plaintiff next asserts that the 1966 Amendment to Rule 38(a)(2), which abolishes the election procedure and gives credit generally, should be applied retrospectively.

In adopting the amendments, the United States Supreme Court's order provided that they "shall take effect on July 1, 1966, and shall govern all criminal pro-

2 See 28 U. S. C. A. §§ 2241, 2243 and compare Shelton v. U. S., 234 F.2d 132 (5th Cir. 1956).

3 We think Rule 35 of the F. R. Cr. P. is by its terms not here applicable.

ceedings thereafter commenced and so far as just and practicable all proceedings then pending." 383 U. S. 1089 (1966). Plaintiff's counsel does not tell us how this case comes within the quoted language since admittedly no proceeding was pending on July 1, 1966. Nor is it suggested that this action is a "criminal proceeding thereafter commenced" within the meaning of the order. We do not find the amendment available to this plaintiff.

Plaintiff argues that denial of credit violates his right to Due Process and Equal Protection of the Laws. It is said that the election procedure imposed additional imprisonment on him because of his "financial inability to make bail." It is true that, as between one who could afford bail and one who could not, it worked a hardship on the latter if he elected not to commence serving his sentence. But this consequence flowed from what we must assume was a proper imprisonment. While the result may be unfair it is not sufficiently invidious to reach constitutional proportions.

Finally, plaintiff contends that denial of credit here violates his right to counsel guaranteed by the Sixth Amendment. Plaintiff's counsel in effect argues that he had a constitutional right to be present in a physical location where he could conveniently consult with his counsel concerning his appeal; that it constituted an undue burden on that right to condition its exercise upon the signing of an agreement which had the effect of forcing him to serve an additional period in custody.

By amending Rule 38(a)(2) to eliminate the election provision, the Supreme Court of the United States has indicated that the procedure left much to be desired. But we do not view the former procedure as being in violation of plaintiff's Sixth Amendment rights. It did not deny him his right to appeal and to consult with his counsel. Insofar as the "election" was involved, the plaintiff's choice was between immediate proximity to counsel and credit on his sentence. The choice given him did not, with-

out more, constitute the placing of an impermissible burden on the exercise of his Sixth Amendment rights.

We affirm the judgment of the district court denying plaintiff's motion for summary judgment, granting defendants' motion to dismiss as to the issue of pre-sentence custody without prejudice to the merits and granting defendants' motion for summary judgment as to the issue of custody pending appeal.

FREEDMAN, *Circuit Judge*, concurring in part and dissenting in part.

I believe the District Court did not have jurisdiction over either of plaintiff's claims.

In my view plaintiff may not seek declaratory judgment in this court because relief is available to him under 28 U.S.C. § 2255. Relief available to federal prisoners under § 2255 parallels the scope of relief available to state prisoners on federal habeas corpus.[1] It is therefore well within the limits of § 2255 to assert collateral claims by which a prisoner's sentence would be reduced and his earlier release obtained. The reported cases show that § 2255 has been invoked on claims for post-sentence credit[2] as well as for pre-sentence credit.[3] Here it is conceded that if the claims made are fully sustained plaintiff is entitled to immediate release.

Under the express requirement of § 2255 relief must be sought in the court which imposed the sentence.[4] This statutory restriction on the federal substitute for habeas

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1 See, *e.g.*, United States v. Hayman, 342 U.S. 205 (1952); Sanders v. United States, 373 U.S. 1, 12-14 (1963), cf. Peyton v. Rowe, 391 U.S. 54 (1968), overruling McNalley v. Hill, 293 U.S. 131 (1934).

2 See Norris v. United States, 190 F.2d 186 (5 Cir. 1951).

3 See United States v. Pratt, 276 F. Supp. 80 (D. N.J. 1967).

4 I find it unnecessary to decide whether relief would be available under Rule 35 of the Federal Rules of Criminal Procedure, for relief under that rule too must be sought in the court which imposed the sentence. See, *e.g.*, Stapf v. United States, 367 F.2d 326 (D.C. Cir. 1966).

corpus was specifically designed to avoid the necessity in habeas corpus cases of bringing the proceeding in the district where the applicant is confined. Its twofold purpose was to overcome the undue burden imposed on the courts of districts in which penitentiaries are located and to make more readily available the records of the sentencing court which at times may prove to be of significance. United States v. Hayman, 342 U.S. 205, 212-13 (1952). To entertain declaratory judgment actions in cases where § 2255 is available would destroy the Congressional purpose in the enactment of § 2255. Plaintiff's claim that the sentencing judge intended him to be credited with the period of his pre-sentence imprisonment, a matter which would best be determined in the sentencing court, illustrates the desirability of effectuating this purpose.

I see no reason to make a distinction in the Attorney General's determination of the duration of the sentence because his refusal to give credit is for the post-sentence rather than the pre-sentence period. In both cases the Attorney General was merely acting as an officer in charge of the management of the penitentiary. It was as the superior of the warden of the penitentiary that the Attorney General received the election which a prisoner was authorized to make under Rule 38(a), and the receipt of such election and its recognition was not the quasi-judicial action of an "agency" which would be subject to judicial review by declaratory judgment under the Administrative Procedure Act.[5]

Even if we had jurdisdiction to consider the claim for post-sentence credit, I would in the exercise of our discretion under the Declaratory Judgment Act[6] leave it to be

5 Compare decisions by a board of parole which are judicially reviewable. See Hurley v. Reed, 288 F.2d 844 (D.C. Cir. 1961); see also Washington v. Hagen, 287 F.2d 332 (3 Cir. 1960), cert. denied, 366 U.S. 970 (1961); Stinson v. United States, 342 F.2d 507 (8 Cir. 1965); Allen v. United States, 327 F.2d 88 (5 Cir. 1964); Halprin v. United States, 295 F.2d 458 (9 Cir. 1961); Freeman v. United States, 254 F.2d 352 (D.C. Cir. 1958); Costner v. United States, 180 F.2d 892 (4 Cir. 1950).

6 Provident Tradesmen's Bank & Trust Co. v. Lumbermen Mutual Insurance Company, 365 F.2d 802, 814 (3 Cir. 1966), reversed on other grounds, 390 U.S. 102 (1968).

decided in the sentencing court as pendent to the claim for pre-sentence credit.

The appeal raises for me serious questions on the merits of the two claims. Believing, however, as I do that they should be decided only in the Southern District of New York, I concur in the dismissal without prejudice of the claim for pre-sentence credit and dissent from the dismissal on the merits of the claim for post-sentence credit.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS

No. 17,349

MORTON SOBELL,

Appellant

v.

ATTORNEY GENERAL OF THE UNITED STATES
DEPARTMENT OF JUSTICE, WASHINGTON, D. C., AND
DIRECTOR, UNITED STATES BUREAU OF PRISONS
DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

(D. C. CIVIL ACTION No. 68-144)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PRESENT: FREEDMAN and SEITZ, *Circuit Judges*, and LAYTON, *District Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the part of the said District Court order, filed July 1, 1968, which denied plaintiff's motion for summary judgment be and hereby is affirmed; the part of the said District Court order, which granted defendants' motion to dismiss as to the issue of pre-sentence custody be and hereby is affirmed, without prejudice to the merits; the part of the said District Court order, which granted defendants' motion for summary judgment as to the issue of custody pending appeal be and hereby is affirmed.

August 16, 1968

ATTEST: Thomas F. Quinn,
Clerk

APPENDIX D

BUREAU OF PRISONS WASHINGTON, D. C. 20537

POLICY STATEMENT 7600.49

SUBJECT: JAIL-TIME CREDIT UNDER COURT DECISIONS

10-27-67

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1. PURPOSE. To implement court decisions regarding jail-time credit on sentences imposed before September 20, 1966.

2. EXPLANATION. Recent cases decided by the Courts of Appeals for the District of Columbia Circuit (*Stapf v. United States*), the Fourth Circuit (*Dunn v. United States*), and the Seventh Circuit (*Smith v. United States*) have interpreted the jail-time credit under 18 U.S.C. 3568 for sentences imposed prior to the effective date of the Bail Reform Act of 1966. These courts have held that sentencing judges must give defendants credit for time spent in jail awaiting trial in cases not requiring mandatory minimum sentences. However, in those cases where the record indicates that the sentencing court could have taken the pre-sentence custody into account in arriving at the sentence which was imposed, it is to be presumed that such credit was given. Thus, if the maximum sentence allowed under the law was imposed, or if the sentence, when added to pre-sentence custody, exceeds the statutory maximum, credit must be given as a corrective matter, because the sentencing judge obviously did not deduct the pre-trial custody period from the sentence.

3. ACTION.

a. Rather than to require this credit to be given individually by the court in each case, the credit will be administratively given to defendants who were sentenced before September 20, 1966 in the District

of Columbia, the Fourth Circuit (which comprises all districts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia), or the Seventh Circuit (which comprises all districts in Illinois, Indiana, and Wisconsin).

b. The simplest situation will involve the defendant who is sentenced to the statutory maximum (5 years for Dyer Act, for example). In such a case, credit will be given for all time spent in custody for want of bail set for the offense, before the date of sentence imposition. In addition, a person who receives less than the maximum, but the amount received plus jail-time exceeds the statutory maximum, will receive such credit so that the total time does not exceed the maximum. For example, if an inmate received 4½ years for a Dyer offense, and was in pre-sentence custody for the offense for 9 months, for want of bail, a credit of 3 months will be applied against the sentence.

c. The credit will also be applied to the violator term of parole and mandatory release violators, whose original sentences would exceed the statutory maximum as defined above.

d. As of now, this credit will not be applied to persons committed under the Youth Corrections Act (18 U.S.C. 5010(b) or (c)) or the Federal Juvenile Delinquency Act (18 U.S.C. 5034), since the crediting provisions of 18 U.S.C. 3568 do not appear to apply to youth or juvenile commitments.

e. Assistance in determining eligibility in questionable cases may be sought from the Legal Counsel.

MYRL E. ALEXANDER
Director, Bureau of Prisons
Commissioner, Federal Prison Industries, Inc.

APPENDIX E

BUREAU OF PRISONS WASHINGTON, D. C. 20537

POLICY STATEMENT 7600.49A

SUBJECT: JAIL-TIME CREDIT UNDER COURT DECISIONS

2-9-68

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1. PURPOSE. To give nationwide implementation to court decisions regarding jail-time credit on sentences imposed between October 2, 1960, and September 19, 1966.

*2. DIRECTIVE AFFECTED. This Policy Statement supersedes Policy Statement 7600.49 dated 10-27-67.

*3. EXPLANATION. In addition to the rulings in the District of Columbia, the Fourth, and the Seventh Circuits referred to in Policy Statement 7600.49, the Court of Appeals for the Fifth Circuit (*Bryans v. Blackwell*) has followed the ruling regarding jail-time credit, which was originally set out in *Stapf v. United States*. Consequently, it has been determined that the *Stapf* ruling should be applied to all federal inmates, regardless of the place of original sentencing.

These courts have held that sentencing judges must give defendants credit for time spent in custody awaiting trial in certain cases other than mandatory minimum sentences, for which such credit was provided in the 1960 amendment to 18 U.S.C. 3568. They have held that credit should be given if the maximum sentence allowed under the law was imposed, or if the sentence, when added to presentence custody, exceeds the statutory maximum. The reasoning behind these cases is that in such situations, the sentencing judge obviously did not deduct the pre-trial custody period from the sentence. If the maximum sentence is not imposed, pre-trial credit should be given only to the extent that the actual time spent in custody would otherwise exceed the statutory maximum.

In all other cases, it will be presumed that the sentencing judge took jail time into account in sentencing and no jail-time credit will be given administratively.*

4. ACTION

*a. Since the *Stapf* ruling was related to the 1960 amendment to 18 U.S.C. 3568, and was designed to remedy a disparity which would otherwise exist between mandatory minimum penalty cases which received the jail-time credit under the statute and nonminimum cases which did not, the credit will be applied only to those who were sentenced during the effective period of the 1960 amendment. Records should be reviewed to identify those defendants who were sentenced between October 2, 1960, and September 19, 1966, inclusively. *

b. The simplest situation will involve the defendant who is sentenced to the statutory maximum (5 years for Dyer Act, for example). In such a case, credit will be given for all time spent in custody for want of bail set for the offense, before the date of sentence imposition. In addition, a person who receives less than the maximum, but the amount received plus jail-time exceeds the statutory maximum, will receive such credit so that the total time does not exceed the maximum. For example, if an inmate received 4½ years for a Dyer offense, and was in pre-sentence custody for the offense for 9 months for want of bail, a credit of 3 months will be applied against the sentence.

c. The credit will also be applied to the term of parole violators, and mandatory release violators, whose original sentences would exceed the statutory maximum as defined above.

d. As of now, this credit will not be applied to persons committed under the Youth Corrections Act (18 U.S.C. 5010(b) or (c)) or the Federal Juvenile Delin-

quency Act (18 U.S.C. 5034), since the crediting provisions of 18 U.S.C. 3568 do not appear to apply to youth or juvenile commitments.

e. Assistance in determining eligibility in questionable cases may be sought from the Legal Counsel.

MYRL E. ALEXANDER
Director, Bureau of Prisons
Commissioner, Federal Prison Industries, Inc.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 509

MORTON SOBELL, PETITIONER

v.

ATTORNEY GENERAL OF THE UNITED STATES

AND

DIRECTOR, UNITED STATES BUREAU OF PRISONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported (Pet. App. B).

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1968 (Pet. App. C). The petition for a writ of certiorari was filed on September 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's request for credit for presentence confinement was properly dismissed because it was made to a court other than that which had sentenced him?

2. Whether the court below correctly determined that petitioner was not entitled to credit against his sentence for confinement pending appeal because he had filed an "Election Not to Begin Service of Sentence," pursuant to the provisions of then Rule 38(a)(2) of the Federal Rules of Criminal Procedure?

STATEMENT

On August 18, 1950, petitioner was arrested on a charge of conspiring to transmit national defense information to the Soviet Union, in violation of 50 U.S.C. (1946 ed.) 32(a), and bail was set at $100,000. Petitioner did not post bail and has remained incarcerated since that time. Petitioner was convicted by a jury in the United States District Court for the Southern District of New York and on April 5, 1951, he was sentenced to 30 years in prison, the maximum term of imprisonment then provided by the statute.

After the imposition of sentence, petitioner was transferred from the Tombs Prison in New York City, where he had been incarcerated during the trial, to the Federal Penitentiary in Atlanta, Georgia. Petitioner then consulted with his counsel with a view to securing his transfer back to New York pending his appeal of his conviction. In this connection and in accordance with the then existing provisions of Rule 38(a)(2) of the Federal Rules of Criminal Proce-

dure, petitioner signed a document stating that he elected not to commence service of his sentence. Petitioner's counsel specifically requested that this document be made available to petitioner. As a result of the election, on July 20, 1951, petitioner was transferred from Atlanta back to New York City, where he remained until November 19, 1952, when the mandate of this Court following a denial of certiorari was filed with the District Court. Petitioner was then transferred to Alcatraz and is presently serving his sentence in the United States Penitentiary at Lewisburg, Pennsylvania.

By letter dated October 31, 1967, petitioner's counsel requested an opportunity to meet with the Attorney General to discuss "the proper day for termination of the prison sentence now being served by Morton Sobell." On November 13, 1967, petitioner's counsel met with the Attorney General's representatives and requested that petitioner receive credit toward his sentence for the period from August 18, 1950, the date of his arrest, to April 5, 1951, the date of his sentencing, and for the period from July 20, 1951, to November 19, 1952, during which time he was in New York City pending review of his conviction. On January 15, 1968, the Department of Justice notified counsel that:

> After carefully reviewing the matter the Department of Justice has decided that Morton Sobell cannot be given credit administratively for the time he was in jail pending his conviction or while his case was on appeal.[1]

[1] Subsequent to petitioner's commencement of this action, the Bureau of Prisons, in reviewing the computation of time, dis-

On January 18, 1968 petitioner filed a complaint for declaratory judgment and injunctive relief in the United States District Court for the District of Columbia. The government filed a motion to change venue, urging that the case be transferred to the United States District Court for the Southern District of New York. In his opposition to this motion petitioner suggested that if the case were to be transferred he would prefer that it be sent to the Middle District of Pennsylvania. In reply, the government acknowledged:

> Although we adhere to the position that the Southern District of New York is the appropriate district to which to transfer this action, *Stapf* v. *United States,* 125 U.S. App. D.C. 100, 367 F. 2d 326 (1966), we have no objection to the transfer of this case to Lewisburg, if the plaintiff prefers Lewisburg.

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covered that petitioner had not been given credit for the time between the affirmance of his conviction and the denial of certiorari. In accordance with its pre-existing policy to consider an election not to serve as terminating on the date of the affirmance by the court of appeals, it recomputed petitioner's time and granted him credit for the period from February 25, 1952, when his conviction was affirmed by the Second Circuit, to November 20, 1952, when the mandate of the Supreme Court was filed. Petitioner's counsel was advised of this on March 5, 1968.

According to Bureau of Prisons files, petitioner is presently due to be released on August 24, 1969. If he were to receive credit for his pre-sentence time *only*, his scheduled release date would be February 6, 1969. If credit were to be accorded only for his "election" time, that date would be February 14, 1969. If he received credit for both of these periods, his release date would have been August 2, 1968.

The government declared, however, that:

> Since *Stapf* held that the sentencing court is the appropriate body to grant credit for pre-sentence custody, if any is available, we do caution that the United States District Court at Lewisburg may not believe itself appropriate for disposition of the issue of pre-sentence custody.

The government's motion for a change of venue was initially denied, and it immediately moved for reconsideration. On March 28, 1968, the District of Columbia District Court ordered the case transferred to the Middle District of Pennsylvania.

On July 1, 1968, the District Court for the Middle District of Pennsylvania entered an order denying petitioner's motion for summary judgment, granting the government's motion to dismiss for lack of jurisdiction that part of the action which sought credit for pre-sentence custody, and granting on the merits the government's motion for summary judgment as to that part of the action which sought credit for the time pending appeal, during which petitioner had elected not to commence service (Pet. App. A). The court of appeals affirmed, agreeing that the question of pre-sentence custody was one for the sentencing court alone to decide and that the district court had properly denied, on the merits, credit for the confinement pending appeal. One judge dissented in part on the ground that the claim for credit for time pending appeal should also be dismissed for lack of jurisdiction (Pet. App. B and C).

ARGUMENT

1. The questions raised by the petition do not warrant plenary consideration by this Court. With respect to petitioner's presentence custody, the only question raised is that of the court to which a prisoner should direct his plea for credit for such custody. This question is one of limited current importance, since 18 U.S.C. 3568, as amended in 1966 (80 Stat. 217), now requires, as to sentences imposed after the effective date of the amendment, that credit be given for "any days spent in custody in connection with the offense or acts for which sentence was imposed." Moreover, as to sentences imposed after 1960, an earlier amendment to the same section of the Code (74 Stat. 738) gave credit for presentence custody for want of bail in cases under criminal statutes requiring mandatory minimum sentences; lower court decisions, *e.g., Stapf* v. *United States*, 367 F. 2d 326 (C.A.D.C.), have required credit to be given similarly in cases not involving mandatory minimum sentences.

The question whether petitioner can avoid the consequences of his knowing election to defer service of his sentence pending his appeal is similarly limited in importance, since the election procedure in question also ceased to exist by reason of the 1966 amendment to 18 U.S.C. 3568 and a contemporaneous amendment to Fed. R. Crim. P. 38(a)(2).

2. The court of appeals properly held that any claim that petitioner's sentence should be corrected so as to give credit for his pre-sentence custody could be made only in the sentencing court. Such relief may be

sought either under 28 U.S.C. 2255, as the court below suggested, or under Fed. R. Crim. P. 35, relating to correction of a sentence alleged to be illegal; the latter procedure was accepted in *Stapf* v. *United States, supra.* In either event, the procedure is available only in the sentencing court. It is manifestly inappropriate that one district court should purport to correct or change a sentence imposed by another.

Petitioner was sentenced to a term of 30 years at a time when the law provided that, "The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence." 62 Stat. 838. The Attorney General's refusal to credit petitioner's pre-sentence custody against his sentence was not an administrative decision but was required by the sentence imposed. If this failure to receive credit for time spent in custody prior to sentencing results in a violation of petitioner's rights, his remedy is to seek to have the judgment of conviction corrected. See *United States* v. *Smith,* 379 F. 2d 628 (C.A. 7); *Stapf* v. *United States, supra,* 367 F. 2d 326 (C.A.D.C.); *United States* v. *Pratt,* 276 F. Supp. 80 (D.N.J.). Petitioner has been and remains free to proceed properly in the court that sentenced him; unless he also were to prevail on his claim to set aside his election pending the appeal from his conviction, petitioner would not be prejudiced by denial of pre-sentence credit until February 6, 1969.

3. When petitioner, with the advice of counsel and in order to be returned to New York from Atlanta, made his election not to begin service of his sentence pending his appeal, Fed. R. Crim. P. 38(a)(2) provided that:

> A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

The courts have uniformly held that under this rule a prisoner is not entitled to credit for time served while an election is in effect. "Having thus voluntarily elected not to serve, service of his sentence automatically ceased, * * * and he may not now complain of the results of his voluntary action." *Allocco* v. *Heritage,* 310 F. 2d 719, 720 (C.A. 5); *Baker* v. *United States,* 139 F. 2d 721 (C.A. 8), rehearing denied, 325 U.S. 894; *Tilghman* v. *Hunter,* 168 F. 2d 946 (C.A. 10); *Shelton* v. *United States,* 234 F. 2d 132 (C.A. 5); *United States* v. *Cortese,* 244 F. 2d 872 (C.A. 2); *Comulada* v. *Willingham,* 351 F. 2d 936 (C.A. 10), certiorari denied, 384 U.S. 973; *Smith* v. *United States and Ramsey Clark, et al.,* Civ. No. 6–3–68 (D.C. Minn., 3d Div.), decided May 1, 1968.

Contrary to petitioner's assertion, the application of this rule here did not unfairly discriminate against him because of his inability to make bail.[2] Petitioner was not denied credit for the time in custody after

[2] In view of the serious nature of the charges against petitioner and the fact that he had fled the country prior to his arrest, the bail of $100,000 was clearly reasonable.

sentence because he was poor but because—with the assistance of counsel—he made a conscious choice to elect not to serve his sentence. Thus, the cases such as *Griffin* v. *Illinois*, 351 U.S. 12 on which petitioner relies are inapposite.

There is no showing that failure of petitioner to be in New York pending the appeal would have rendered ineffective the efforts of counsel in analyzing and arguing from the written record of the trial. If, in fact, there were such circumstances petitioner should have raised them in 1950 in support of a motion that he be returned to New York without an election. Cf. *United States* v. *Daniels*, 377 F. 2d 255 (C.A. 6).

Petitioner's inability to post the bond set by the trial court in 1950 did require him to elect to postpone service of his sentence in order to exercise his choice to remain in New York pending his appeal. As noted, both this Court and the Congress have since taken steps to change this situation. But both the amendment to Rule 38(a)(2) and that to 18 U.S.C. 3568 were prospective amendments, and petitioner's argument that the Constitution requires that they be made retroactive is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
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KEVIN T. MARONEY,
H. YALE GUTNICK,
Attorneys.

OCTOBER, 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 509

MORTON SOBELL, PETITIONER

v.

ATTORNEY GENERAL OF THE UNITED STATES AND DIRECTOR, UNITED STATES BUREAU OF PRISONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the direction of the Court that the government submit "a further response to petitioner's contention at pages 10–11 of his petition for writ of certiorari that there is no rational basis for applying 18 U.S.C. § 3568 only to prisoners sentenced after October 2, 1960." [1]

[1] In our original brief in opposition we did not respond to the merits of petitioner's contention that he was entitled to credit against his sentence for the period of his pre-sentence custody, but addressed ourselves only to the holding of the court below that the claim for credit for such time had to be

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In 1960 Congress amended 18 U.S.C. § 3568 to provide that the Attorney General should give credit for pre-sentence custody in any case where sentence was imposed on or after October 2, 1960, under a statute requiring the imposition of a mandatory minimum sentence (74 Stat. 738). Prior to the effective date of this amendment there were no situations in which the Attorney General was either required or permitted to give credit for pre-sentence custody.

In 1966, the Court of Appeals for the District of Columbia Circuit held in *Stapf* v. *United States,* 367 F. 2d 326, that in view of the fact that the 1960 amendment to § 3568 gave credit for pre-sentence custody to some prisoners sentenced after October 2, 1960, it would be unconstitutional to discriminate against other prisoners sentenced after that date by denying them credit for pre-sentence custody. After this decision of the District of Columbia Circuit was followed in the Fourth and Seventh Circuits (see *Dunn* v. *United States,* 376 F. 2d 191 and *United States* v. *Smith,* 379 F. 2d 628), the Bureau of Prisons

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brought in the Southern District of New York, where the sentence was imposed.

Subsequent to the filing of our opposition, petitioner filed a 2255 motion in the United States District Court for the Southern District of New York seeking credit for the pre-sentence custody and also credit for the time spent in custody pending appeal under his election not to commence service of sentence. That motion was filed on October 15, 1968 and is presently scheduled for argument in the district court on November 6, 1968. We reiterate our position that such a proceeding in the sentencing court is the only appropriate method to seek to remedy an allegedly improper lack of credit for pre-sentence custody.

issued a policy statement indicating that it would give credit for pre-sentence custody to prisoners sentenced within those circuits (Pet. App. D); the statement did not distinguish among sentences according to date. On further consideration and after the Fifth Circuit had rendered a decision following *Stapf* (see *Bryans* v. *Blackwell*, 587 F. 2d 764), the Bureau of Prisons amended its policy statement to apply the *Staph* ruling to all federal inmates. The amended policy statement declared (Pet. App. E, p. 43):

> Since the *Stapf* ruling was related to the 1960 amendment to 18 U.S.C. 3568, and was designed to remedy a disparity which would otherwise exist between mandatory minimum penalty cases which received the jail-time credit under the statute and nonminimum cases which did not, the credit will be applied only to those who were sentenced during the effective period of the 1960 amendment. * * *

This ruling was totally consistent with the reasoning of the *Stapf* decision. The unconstitutional discrimination found in *Stapf* resulted from the fact that the 1960 amendment required [redacted] the giving of credit for pre-sentence custody to those who received mandatory minimum sentences while such credit was not being given to other prisoners sentenced at the same time. As the court in *Stapf* recognized, however, the 1960 amendment to § [redacted] 3568 was not retroactive, 367 F. 2d at 330. As to prisoners sentenced prior to October 2, 1960, the applicable statute provided uniformly that "the sentence of imprisonment of any person * * * shall commence to run from the date on which

such person is received at the penitentiary, reformatory, or jail for service of said sentence. * * * No sentence shall prescribe any other method of computing the term." 62 Stat. 838 (Pet. 4).

Since petitioner's sentence is governed by a statute that applied without discrimination to all persons convicted contemporaneously with him, there is here none of the discrimination between persons similarly situated that was determinative in *Stapf*. To hold otherwise would be contrary to the express congressional directions that the subsequent amendments to 18 U.S.C. 3568 not be applied retroactively. See *Bandy* v. *United States*, 396 F. 2d 929 (C.A. 8); *Williams* v. *United States*, 335 F. 2d 290 (C.A.D.C.).

Congress clearly has the power to prescribe sentences for crimes committed against the United States, and has the power to reduce the penalties provided in earlier statutes. If it chooses to do so only prospectively it does not discriminate in such a way as to deny due process to those sentenced prior to the change whose sentences were consistent with the statute as it existed at the time of sentence. Similarly, here there is no unjust discrimination violative of due process against those who were sentenced prior to the amendments to § 3568 merely because Congress determined that those amendments should not be given retroactive effect. See *Comerford* v. *Massachusetts*, 233 F. 2d 294 (C.A. 1), certiorari denied, 352 U.S. 899.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 509

MORTON SOBELL, *Petitioner,*

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONSE TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

I.

The government's Supplemental Memorandum reveals no rational basis for its position that maximum-sentence prisoners must be credited with pre-sentence confinement *only* if they were sentenced after October 2, 1960. According to the government, the cut-off date is dictated by the reasoning of *Stapf* v. *United States,* 367 F. 2d 326. We believe that this is not a sound reading of *Stapf;* if it were, then *Stapf* is itself irrational.

At the time Sobell was sentenced, 18 U.S.C. § 3568 provided:

> "The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence.
>
> If any such person shall be committed to a jail or other place of detention to wait transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
>
> No sentence shall prescribe any other method of computing the term." (62 Stat. 838.)

On September 2, 1960, Congress amended the section, applicable to sentences imposed on or after October 2, 1960, to add the following proviso to the first sentence:

> "Provided, That the Attorney General shall give any such person credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence." (74 Stat. 738.)

Subsequently, section 4 of the Bail Reform Act of 1966 amended § 3568, applicable to sentences imposed on or after September 20, 1966, so as to require the Attorney General to give a federal prisoner "credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." 80 Stat. 217.

The government as already noted concedes that by force of numerous court of appeals decisions (cited in our petition at p. 10) 18 U.S.C. § 3568 is to be interpreted so as to give credit for pre-sentence custody to persons sentenced between October 2, 1960 and September 20, 1966, to maximum sentences.

The reasoning of the cited cases, however, is equally applicable to persons who, like Sobell, were sentenced prior to October 2, 1960. Thus *Stapf* stated:

> "The legislative history [of the 1960 amendment to § 3568] reveals the assumptions and purposes of Congress: Congress was aware of and approved the general practice of federal courts to provide defendants credit against their sentence for time spent in jail for lack of bail. But in the absence of a statutory amendment a court did not have authority to give such credit to defendants sentenced for minimum term offenses. This situation, in the view of Congress, created an unwarranted disparity in the effective sentences of defendants convicted of minimum term offenses, in terms of total time in detention, between those who made bail and those who did not. To remove this disparity Congress amended § 3568 to provide an automatic credit for minimum term offenses. . . .
>
> "*Congress made no provision in this amendment for defendants sentenced for offenses not carrying minimum terms of imprisonment . . . because it assumed that a credit for presentence custody for want of bail would continue to be provided by sentencing courts as a matter of course.*" (367 F. 2d at 328, footnotes omitted, emphasis supplied.)
>
> * * * *
>
> "This is not a case, we reiterate, where Congress removed part of an evil but disclaimed action on the rest. This is a case, rather, where Congress

> acted as to the only evil that required legislative action, and assumed *that in all other instances equivalent relief would be provided by the courts.*
> . . .
> "The foregoing statutory and constitutional considerations compel us to hold that it was and is the duty of the sentencing courts to provide credit for presentence custody for want of bail to all defendants not granted credit administratively by virtue of the provisions of § 3568." (367 F. 2d at 329-30, footnotes omitted, emphasis supplied.)

The theory of *Stapf*, therefore, is that in enacting the 1960 amendment, Congress "assumed that a credit for presentence custody for want of bail would *continue* to be provided by sentencing courts as a matter of course," and "acted only on the evil that required legislation"[1]—that is, the inability of the courts to allow credit for pre-sentence custody where the statute required a minimum sentence.

Similarly, the court stated in *Bryans* v. *Blackwell*, 387 F. 2d 264, at 767, emphasis in original:

> "We agree with the Court of Appeals for the Fourth Circuit in the *Dunn* case and the District of Columbia Circuit in the *Stapf* case that persons sentenced prior to September 20, 1966, *who have not been given the benefit of uncounted time served* must be afforded the same benefits as are given to the mandatory minimum sentence prisoners under the 1960 amendment."

In sum, the holdings in *Stapf* and its progeny apply to Sobell's case even though he was sentenced prior to October 2, 1960.

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[1] The language in the *Stapf* case illuminates the remarks made by the sentencing judge, quoted at pp. 6-7 of our petition, that the months already served by petitioner "have to be so considered."

Indeed it would be impossible to construe § 3468 as requiring credit for jail time with respect to post-1960 sentences but not pre-1960 sentences. For nothing was changed by the 1960 amendment except the addition of the proviso confined to minimum mandatory sentence cases. The remainder of § 3568 stayed the same, and the same words must have meant the same before as well as after the 1960 amendment.

The Department of Justice itself originally construed *Stapf, Dunn* and *Smith* to require credit with respect to sentences imposed before 1960, although limiting that policy to prisoners sentenced in the District of Columbia, Fourth and Seventh Circuits. Policy Statement 7600.49. It is true that subsequent to the filing of the complaint in this case in which we complained that such a geographical limitation was arbitrary and capricious, the Bureau of Prisons issued a new policy statement, 7600.49A providing that the credit should be given nationwide but only to defendants who were sentenced after October 2, 1960. It is clear from the text of *Stapf,* however, that the Bureau was right in its first reading of the decision, and that *Stapf* need not be interpreted irrationally as the government now contends.

In its supplemental memorandum (p. 3) the government suggests that its change of view was influenced by the Fifth Circuit's decision in *Bryans* v. *Blackwell, supra.* But the language of that opinion, quoted *supra,* made no distinction between those sentenced before or after October 2, 1960, and affords no basis for the government's change of position subsequent to the filing of the complaint by petitioner.

II.

The government brings to the attention of the Court in footnote 1, p. 2, that petitioner filed a 2255 motion in the United States District Court for the Southern District of New York seeking credit for the pre-sentence custody. We filed this motion only because we thought it necessary to protect petitioner in the event this Court agrees with the Third Circuit that the courts below did not have jurisdiction of the question. However, it should be obvious that petitioner will not receive any effective relief on the question if he is required to litigate the point in the Southern District through an appeal to the Second Circuit, and back again to this Court. By that time the issue will be moot.

In our petition we asked the Court to grant certiorari so as to settle the appropriate procedures for prisoners to obtain judicial determination of their claims that they are being imprisoned beyond the term of their sentences. The need for such clarification is emphasized by the fact that the government now argues in its opposition in the Southern District of New York, that even if petitioner's claim is meritorious, he is not entitled to relief under 28 U.S. Code § 2255 at this time.

Respectfully submitted,

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